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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 245

MILTON BLOOMBAUM,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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INDEX

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting The Writ	4
Conclusion	8
Appendix A—Opinion and Judgment of the Court of Appeals of Maryland	1a
Appendix B—Constitutional Provisions Involved	2a

Table of Authorities

Cases

Bloombaum v. State, 237 Md. 663, 207 A. 2d 651 (1965)	1
Fox v. State, 383 S.W. 2d 25 (Tenn., 1964)	7
Gross v. State, 235 Md. 429, 201 A. 2d	7
Mapp v. Ohio, 367 U.S. 643 (1961)	7
People v. Burke, 394 P. 2d 67 (Calif. 1964)	7
People v. Erickson, 201 N.E. 2d 424 (Ill., 1964)	7
Preston v. United States, 376, U.S. 364 (1964)	4, 5, 6, 7
State v. Edmondson, 379 S.W. 2d 486 (Mo., 1964)	7
State v. James, 169 So. 2d 89 (La., 1964)	7
State v. King, 201 A. 2d 758 (N.J., 1964)	7
Stoner v. California, 376 U.S. 483 (1964)	7
United States v. Di Re, 332 U.S. 581 (1948)	7
Wong Sun v. United States, 371 U.S. 471 (1963)	7

Others

PAGE

Annotated Code of Md. (1957 Ed. and 1963 Cum. Supp):
- Article 27, Section 276(n) 2
- Article 27, Section 277 2
- Article 27, Section 297 2
- Article 27, Section 300 2

Constitution of the United States:
- Fourth Amendment 2
- Fourteenth Amendment 2

28 U.S.C.A., Sec. 1257(3) 2

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STATE OF MARYLAND,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Milton Bloombaum, Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered March 15, 1965, affirming a judgment of conviction and sentence of the Circuit Court for Montgomery County, Maryland.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported as *Bloombaum v. State*, 237 Md. 663, 207 A. 2d 651 (1965). It is printed as Appendix A hereto.

JURISDICTION

On March 15, 1965, the Court of Appeals of Maryland affirmed the conviction of Petitioner, Milton Bloombaum,

of unlawful possession of a narcotic drug and a hypodermic syringe and needle adapted for the use of habit forming drugs, in violation of Article 27, Sections 276(n), 277, 297 and 300 of the Annotated Code of Maryland (1957 Ed. and 1963 Cum. Supp.). A timely filed motion for reargument was denied on April 28, 1965.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1257(3).

QUESTION PRESENTED

Whether the Court of Appeals of Maryland decided a federal question of substance in a way not in accord with applicable decisions of this Court when it held that a search of an automobile not undertaken until almost two hours after the Petitioner, who had occupied it, had been arrested and taken in custody to a police station, and after the automobile had been taken to the police station as well, was permissible as being incidental to the arrest.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the prohibition of unreasonable search and seizures of the Fourth Amendment to the Constitution of the United States as enforced against the States through the Fourteenth Amendment. They are set forth as Appendix B hereto.

STATEMENT OF THE CASE

The Petitioner, Milton Bloombaum, and Max A. Solomon were charged in a two count criminal information, filed by the State's Attorney for Montgomery County, Maryland in the Circuit Court for that County, with (1) unlawful possession of marihuana and (2) unlawful possession of a hypodermic syringe and needle adapted for the use of

habit forming drugs (R. 6). The Petitioner filed a timely motion to suppress evidence seized as a result of a search of an automobile (R. 7), and the trial judge, who tried the case without a jury, heard testimony on the motion in the course of the trial.

The evidence showed that on April 16, 1963, at approximately 11:45 a.m., Lieutenant Harold A. Treadwell of the Montgomery County Police, who was accompanied by Officer Robert A. Peay, arrested Mr. Solomon while he was waiting at the office of Dr. John N. Andrews for a prescription for dilaudid, a narcotic drug (R. 7, 12). Mr. Solomon's car was parked across the street from the doctor's office, approximately 200 yards away, and the Petitioner, Milton Bloombaum, was seated behind the steering wheel (R. 7-8, 14).

Officer Peay, on instructions from Lieutenant Treadwell, left the doctor's office and walked to the automobile. The officer identified himself to the Petitioner and had a brief conversation with him (R. 9, 14). Shortly thereafter, Corporal Robinson, another policeman, arrived, and Mr. Solomon and the Petitioner, Bloombaum, were both arrested.

The two prisoners were taken to the detective bureau of the Silver Spring police station for questioning (R. 15). Mr. Solomon's automobile was also taken there and it was placed on the parking lot (R. 9). Almost two hours after the arrest, the automobile was searched, and under the front seat on the driver's side the police found a small quantity of marihuana, a hypodermic syringe and needles (R. 15, 20).

Lieutenant Treadwell, the man who directed the investigation, testified that two warrants, an arrest warrant and a search warrant, had been procured in the case. He said that the arrest warrant, the first warrant, had been issued

at approximately 9:30 a.m., two hours before the men were arrested, and that Corporal Robinson brought it to the scene of the arrest and read it to the prisoners before they were taken to the police station. Lieutenant Treadwell could not testify about the time when the second warrant, the search warrant, was issued (R. 15), but Officer Peay was clear in his statement that the second warrant, presumably the search warrant, was not issued until *after* the automobile had been searched and the evidence found.[1]

The motion to suppress was denied, the evidence was admitted and the Petitioner and Solomon were convicted on both counts. The Petitioner was fined two hundred dollars and he was sentenced to the Maryland Penitentiary for a term of four years (R. 5). The Court of Appeals of Maryland, on appeal, held that the arrest of the Petitioner was lawful and that, therefore, the evidence seized as a result of a search of the automobile at the police station almost two hours later was admissible.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland, in considering the search as incidental to the arrest, departed from the teaching of this Court in *Preston v. United States*, 376 U.S. 364

---

[1] "Q. Mr. Bloombaum was sitting in the driver's seat when you arrived at the scene? A. Yes sir.

Q. And when you later looked and searched the car where were these, this syringe and dropper; where was that found? A. I found that right under the driver's seat right by where the left foot would be if he brought it back against the seat, sir.

Q. To go back to the warrants again, I didn't hear you say for whom these warrants were obtained; the ones you personally obtained, those were both defendants? A. Yes, sir.

Q. And Bloombaum and Solomon, and that was with possession? A. Yes, sir.

Q. Of these syringe and needles. Now, was this after you had searched the car that you obtained that warrant? A. Yes, sir" (R. 20).

(1964). The defendants in *Preston* were arrested by local police for vagrancy while they were seated in an automobile in Newport, Kentucky. After they were taken to the police station and their automobile was taken to a garage, the automobile was searched. The police found women's stockings with mouth and eye holes, an illegally manufactured licensed plate and other items. One of the prisoners, when confronted with the fruits of the search, confessed that he and his companions had intended to rob a bank in Berry, Kentucky. The three men were subsequently charged in the District Court for the Eastern District of Kentucky with conspiracy to rob a federally insured bank. The items which had been found in the automobile were admitted in evidence over objection. After conviction and affirmance by the Court of Appeals for the Sixth Circuit, this Court granted certiorari and held, without dissent, that the warrantless search of the automobile could not have been justified as having been incidental to the arrests of its former occupants. Mr. Justice Black, speaking for the Court, declared:

> "It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 344, 58 L. Ed. 652 (1914); Agnello v. United States, 269 U.S. 20, 30, 46 S. Ct. 4, 5, 70 L. Ed. 145 (1925). This right to search and seize without a search warrant extends to things under the accused's immediate control, Carroll v. United States, supra, 267 U.S., at 158, 45 S. Ct. at 287, 69 L. Ed. 543, and, to an extent depending on the circumstances of the case, to the place where he is arrested, Agnello v. United States, supra, 269 U.S. at 30, 46 S. Ct. at 5, 70 L. Ed. 145; Marron v. United States, 275 U.S. 192, 199, 48 S. Ct.

74, 77, 72 L. Ed. 231 (1927); United States v. Rabinowitz, 339 U.S. 56, 61-62, 70 S. Ct. 430, 433, 94 L. Ed. 653 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime — things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. Agnello v. United States, supra, 269 U.S., at 31, 46 S. Ct. at 5, 70 L. Ed. 145. Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the questions of the reasonableness of a search at a later time and at another place. See Stoner v. California, 376 U.S. 483, 84 S. Ct. 889. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime — assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy. Cf. United States v. Jeffers, 342 U.S. 48, 51-52, 72 S. Ct. 93, 95, 96 L. Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See Carroll v. United States, supra, 267 U.S. at 153, 45 S. Ct. at 285, 69 L. Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, there-

> fore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." 376 U.S. 364, 367-368.

The search of the automobile, illegal at its inception, could not be validated by the disclosure of the evidence or by the subsequently issued warrant. "We have had frequent occasion to point out," the Court said in *United States v. Di Re*, 332 U.S. 581, 595 (1948), "that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." See also *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

A number of the State courts, cognizant of their duty under *Mapp v. Ohio*, 367 U.S. 643 (1961), have held *Preston* to be controlling in prosecutions brought in their jurisdictions See, e.g., *People v. Burke*, 394 P. 2d 67 (California, 1964); *People v. Erickson*, 201 N.E. 2d 424 (Illinois, 1964); *State v. James*, 169 So. 2d 89 (Louisiana, 1964); *State v. Edmondson*, 379 S.W. 2d 486 (Missouri, 1964); *State v. King*, 201 A. 2d 758 (New Jersey, 1964); *Fox v. State*, 383 S.W. 2d 25 (Tennessee, 1964). In *Gross v. State*, 235 Md. 429, 201 A. 2d 808 (1964), where police officers without a warrant were admitted to the defendant's hotel room by an employee of the hotel who had a pass key, the Court of Appeals of Maryland held that the search of the room was illegal and that evidence seized there was inadmissible, citing *Preston*, as well as *Stoner v. California*, 376 U.S. 483 (1964), as authority. If *Preston* was applicable in the *Gross* case, it should, *a fortiori*, have been applied in the context of the present case.

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

JOSEPH S. KAUFMAN,
ARNOLD M. WEINER,
DONALD DANEMAN,
Counsel for Petitioner.

APPENDIX A

Opinion and Judgment of Court of Appeals of Maryland

Per Curiam:

Appellant was convicted in the Circuit Court for Montgomery County, under Information 5619, of unlawfully having in his possession and under his control a narcotic drug, and unlawfully having a hypodermic syringe and needle in his possession for the purpose of unlawfully administering habit-forming drugs.

Represented here by experienced and able counsel, appellant concedes that if his arrest were legal, his conviction was justified.

The exact attack on the arrest is not explicitly pinpointed, but it apparently is a claim that police officers arrested appellant without an arrest warrant and without probable cause to believe that a felony had been committed and that he committed it; and the arrest was not for a misdemeanor committed in the officers' presence. However, during a full evidentiary hearing on the legality, *vel non*, of the arrest, the officers testified that at the time of the arrest, they had in their possession an arrest warrant for appellant, it was read to him, and one officer remembered "cepiing" it.

This evidence is not contradicted, and no attack is made upon the validity of the arrest warrant. No citation of authority is necessary to sustain the proposition that an arrest made by police officers in executing a valid arrest warrant is lawful, both under state and federal standards.

Judgment And Sentence Affirmed,
Costs To Be Paid By Appellant.

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4, Constitution of the United States of America:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 14, Section 1, Constitution of the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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INDEX

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	8

Table of Citations

Cases

Bloombaum v. State, 237 Md. 663, 207 A. 2d 651 (1965)	1
Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963)	5

Statutes

Annotated Code of Maryland (1957 Ed. and 1963 Cum. Supp.) Article 27:	
Section 276(n)	2
Section 277	2
Section 297	2
Section 300	2
28 U.S.C.A., Section 1257(3)	2

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The State of Maryland, by Thomas B. Finan, Attorney General of Maryland and Robert F. Sweeney, Assistant Attorney General, Chief, Criminal Division, responds herein, as directed by this Honorable Court, to a writ of certiorari to the Court of Appeals of Maryland.

OPINION BELOW

Bloombaum v. State, 237 Md. 663, 207 A. 2d 651 (1965).

JURISDICTION

On March 15, 1965, the Court of Appeals of Maryland confirmed the conviction of Petitioner, Milton Bloombaum, of unlawful possession of a narcotic drug and a hypodermic

syringe and needle adapted for the use of habit forming drugs, in violation of Article 27, Sections 276(n), 277, 297 and 300 of the Annotated Code of Maryland (1957 Ed. and 1963 Cum. Supp.). A timely filed motion for reargument was denied on April 28, 1965.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1257(3).

QUESTION PRESENTED

Whether the Court should grant the Writ.

STATEMENT OF THE CASE

The Petitioner, Milton Bloombaum, and Max A. Solomon were charged in a two count criminal information, filed by the State's Attorney for Montgomery County, Maryland in the Circuit Court for that County, with (1) unlawful possession of marihuana and (2) unlawful possession of a hypodermic syringe and needle adapted for the use of habit forming drugs (R. 6). The Petitioner filed a timely motion to suppress evidence seized as a result of a search of an automobile (R. 7), and the trial judge, who tried the case without a jury, heard testimony on the motion in the course of the trial.

The evidence showed that on April 16, 1963, at approximately 11:45 A.M., Lieutenant Harold A. Treadwell of the Montgomery County Police, who was accompanied by Officer Robert A. Peay, arrested Mr. Solomon while he was waiting at the office of Dr. John N. Andrews for a prescription for dilaudid, a narcotic drug (R. 7, 12). Mr. Solomon's car was parked across the street from the doctor's office, approximately 200 yards away, and the Petitioner, Milton Bloombaum, was seated behind the steering wheel (E. 7-8, 14).

Officer Peay, on instructions from Lieutenant Treadwell, left the doctor's office and walked to the automobile. The officer identified himself to the Petitioner and had a brief conversation with him (R. 9, 14). Shortly thereafter, Corporal Robinson, another policeman, arrived, and Mr. Solomon and the Petitioner, Bloombaum, were both arrested.

The two prisoners were taken to the detective bureau of the Silver Spring police station for questioning (R. 15). Mr. Solomon's automobile was also taken there and it was placed on the parking lot (R. 9). Almost two hours after the arrest, the automobile was searched, and under the front seat on the driver's side the police found a small quantity of marihuana, a hypodermic syringe and needles (R. 15, 20).

The motion to suppress was denied, as the trial judge found (a) that the arrest was legal and (b) that the resultant search of the automobile was made after a warrant for such search was obtained. Petitioner was convicted, fined $200.00, and sentenced to the Maryland Penitentiary for a term of four years. The Maryland Court of Appeals affirmed the conviction, holding that the arrest of the Petitioner was legal as that arrest had been made pursuant to a valid arrest warrant issued prior to the arrest.

REASONS FOR DENYING THE WRIT

The Respondent believes that there are two reasons why this writ must be denied.

The first reason is that the claim now being presented to this Court was never presented to the Court of Appeals of Maryland.

In his Brief to the Maryland Court of Appeals, Appellant questioned the legality of the search and seizure, not on the

basis that said search was made at a place and time too remote from the arrest to be incidental thereto, but on the basis that the arrest itself was illegal, the search therefore illegal, and the evidence obtained therefrom inadmissible.

In his Petition for Writ of Certiorari to this Court Petitioner questions whether the Maryland Court of Appeals

> "decided a Federal question of substance in a way not in accord with applicable decisions of this Court when it held that a search of an automobile not undertaken until almost two hours after the Petitioner who had occupied it had been arrested and been taken into custody to a police station and after the automobile had been taken to the police station as well, *was permissible as being incidental to the arrest.*"

No such holding was reached by the Maryland Court of Appeals, as is obvious from their four paragraphs per curiam opinion, reprinted at Appendix A in the Petition for Writ of Certiorari. No such conclusion was reached by the Maryland Court of Appeals because, as aforesaid, the question pertaining to the search of the automobile was not raised, and, indeed, it was conceded by both Appellant and Appellee before the Maryland Court of Appeals that the search of the automobile was made pursuant to a search warrant obtained for that purpose.

In the Statement of Facts in Appellant's Brief to the Maryland Court of Appeals, the following comment is made at page 2:

> "The Appellant was taken to Police Headquarters, where he was interrogated by Lt. Treadwell. A search warrant was then obtained by Det. Peay, to search the automobile in which the Appellant had been sitting, prior to his arrest."

In the State's Brief to the Maryland Court of Appeals, it states at page 3 thereof, in the Statement of Facts:

> "After the search warrant was issued, the automobile was searched by Detective Peay and he found the marijuana, hypodermic syringe and needle, which formed the basis of the charges of which Appellant was convicted."

That Statement of Facts continues, in illumining manner, as follows:

> "Detective Peay *then got another warrant for Appellant's arrest,* charging the possession of the items found in the automobile. Appellant was convicted and sentenced for the possession of these items, and from that judgment he appeals." (Emphasis supplied.)

Respondent says, therefore, that Appellant, having conceded the legality of the search of the automobile before the Court of Appeals of Maryland, now has no standing to raise that question in the instant Petition for Writ of Certiorari. Nor is this waiver by the Petitioner, who at that time was represented by competent counsel, affected by the decision of this Court in *Fay v. Noia,* 372 U.S. 391, as the instant proceeding involves appellate review of conviction, and *Fay* applies only to Federal habeas corpus proceedings.

Respondent's second reason for the denial of the Writ is even more persuasive, we believe, than the waiver point. Simply stated, the facts set out in the Petition for Writ of Certiorari are inaccurate and misleading.

Petitioner, in his motion, indicates that the search warrant, for the search of the automobile in question, was not obtained until *after* the search was made. This is a totally unsubstantiated assumption.

At page 4 of his Petition for Writ of Certiorari, Petitioner makes the following statement:

> ". . . Lieutenant Treadwell could not testify about the time when the second warrant, the search warrant,

was issued (R. 15), but Officer Peay was clear in his statement that the second warrant, presumably the search warrant, was not issued until *after* the automobile had been searched and the evidence found."

Petitioner, at that same page, in his footnote 1, sets forth the following testimony from the record:

"Q. Mr. Bloombaum was sitting in the driver's seat when you arrived at the scene? A. Yes sir.

"Q. And when you later looked and searched the car where were these, this syringe and dropper; where was that found? A. I found that right under the driver's seat right by where the left foot would be if he brought it back against the seat, sir.

"Q. To go back to the warrants again, I didn't hear you say for whom these warrants were obtained; the ones you personally obtained, those were both defendants? A. Yes, sir.

"Q. And Bloombaum and Solomon, and that was with possession? A. Yes, sir.

"Q. Of these syringe and needles. Now, was this after you had searched the car that you obtained that warrant? A. Yes, sir.

From all of Officer Peay's testimony, however, it is obvious that the warrant referred to in this extract of testimony was *not* the warrant for the search of the automobile, but a third warrant obtained by him, charging the Petitioner with the possession of marihuana, hypodermic syringe and needle found in the automobile at the time of the search.

At page 104 of the transcript of testimony before the trial judge, Officer Peay testified as follows:

"Q. Did there come a time subsequent thereto when a search was made of the vehicle *pursuant* to a search warrant having been obtained? A. Yes, sir." (Emphasis supplied.)

Again, at page 115 of the transcript, Officer Peay testified as follows:

> "Q. Now, Detective, I believe you testified you yourself got a warrant, is that correct, or am I incorrect? A. Later on in the day, sir.
>
> "Q. What kind of warrant did you get? A. For having possession of narcotics.
>
> "Q. You got a warrant for possession of narcotics after you had arrested him? A. To the best of my knowledge, yes, sir. This was after investigation had been made."

It fully appears from all of the testimony before the trial court that three warrants were involved in this case:

1. The warrant for the arrest of the Petitioner which was obtained prior to his arrest, and used to arrest him. Both the trial court and the Maryland Court of Appeals sustained the validity of this warrant.

2. The warrant for the search of the automobile, which was obtained by the officers when the Petitioner declined to permit them to search the vehicle without such a warrant. The full record leaves no doubt that this warrant was obtained after the arrest and before the search of the car.

3. An additional warrant, obtained by Officer Peay, after the search of the motor vehicle, charging the Petitioner with possession of the narcotics and narcotic paraphernalia disclosed by the search of the car.

A full examination of this case can leave little doubt that the rights of Petitioner were fully protected in every regard.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied. The alleged violation of Petitioner's constitutional rights set out in the Petition was not only presented to the Maryland Court of Appeals but in fact Petitioner admitted to that Court the validity of the search which he now attacks.

In addition, from an examination of the transcript of the trial and the Briefs to the Maryland Court of Appeals, it is apparent that the search of the vehicle now objected to, was not made "incidental to the arrest" but was made on the authority of a search warrant obtained for that specific purpose.

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT F. SWEENEY,
Assistant Attorney General
of Maryland, Chief Criminal
Division,

Counsel for Respondent.